

A **Huang Min & 31 Ors v Malaysian Airline System Bhd & Ors**

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO
WA-21NCVC-43-04 OF 2016
AZIZUL AZMI ADNAN JC
10 AUGUST 2016

C *Civil Procedure — Stay of proceedings — Special circumstances — Plaintiffs filed application to stay proceedings pending determination by foreign court on issue of jurisdiction — Whether present action protective writ — Whether facts of case amounted to special circumstances as to justify grant of stay of proceedings*

D This was an application filed by the next-of-kin of the passengers on the flight MH370 ('the plaintiffs') to stay proceedings pending a determination by the United States ('US') court on whether the US court had jurisdiction to hear cases commenced in the US by the plaintiffs. The plaintiffs submitted that the present action had been filed as a protective writ in order that the action did not become barred by limitation. Further, it was submitted that the facts of the present action amounted to special circumstances as would justify the grant of a stay of the Malaysians proceedings.

E **Held**, dismissing the plaintiffs' application with costs of RM3,000 each to the first defendant and second defendant; and RM3,000 to the fourth to the seventh defendants collectively:

(1) Based on the circumstances of the case, the Malaysian action had been filed at least partly as a protective writ. This could be seen from the fact that the first of the three US actions had been commenced one month prior to the Malaysian writ, and that the Malaysian action had been filed just four days prior to the onset of limitation. The form of the statement of claim which stated in detail the nature of the plaintiffs' claim did not make it any less a protective writ (see paras 6–7).

H (2) The protective nature of the writ did not of itself give rise to special circumstances, although it did provide a valid answer to the contention that the Malaysian action amounted to an abuse of the court process. Having regard to the facts of the case, the balance of justice and convenience lay in refusing the application for stay. The US action was at a very nascent stage of proceedings, and there was nothing to prevent the plaintiffs from discontinuing the Malaysian action against the first to third defendants upon the plaintiffs obtaining a favourable outcome on the jurisdictional question before the US court (see paras 9 & 14).

[Bahasa Malaysia summary]

Ini adalah permohonan yang difailkan oleh waris kadim penumpang-penumpang penerbangan MH370 ('plaintif-plaintif') untuk menangguhkan prosiding sementara menunggu penentuan oleh mahkamah Amerika Syarikat ('AS') atas sama ada mahkamah AS mempunyai bidang kuasa untuk mendengar kes-kes yang bermula di AS oleh plaintif-plaintif. Plaintif-plaintif berhujah bahawa tindakan ini telah difailkan sebagai writ perlindungan supaya tindakan tersebut tidak boleh dihalang oleh had masa. Selanjutnya, ia diujahkan bahawa fakta tindakan ini merupakan keadaan khas seperti akan menjustifikasikan pemberian penangguhan terhadap prosiding Malaysia.

Diputuskan, menolak permohonan plaintif-plaintif dengan kos sebanyak RM3,000 kepada setiap responden pertama dan kedua; dan RM3,000 kepada defendan keempat hingga ketujuh secara kolektif:

- (1) Berdasarkan keadaan kes, tindakan Malaysia telah difailkan sekurang-kurangnya sebahagian sebagai writ perlindungan. Ini boleh dilihat daripada fakta bahawa tindakan pertama daripada tiga tindakan AS telah dimulakan sebulan sebelum writ Malaysia, dan bahawa tindakan Malaysia telah difailkan empat hari sebelum bermulanya had masa. Bentuk pernyataan tuntutan yang dinyatakan dengan terperinci sifat tuntutan plaintif-plaintif tidak membuatnya bukan sebagai writ perlindungan (lihat perenggan 6–7).
- (2) Sifat perlindungan writ tidak membuatnya berbangkit kepada keadaan khas, walaupun ia memberi jawapan yang sah kepada hujahan bahawa tindakan Malaysia merupakan penyalahgunaan proses mahkamah. Mengambil kira kepada fakta kes, imbalan keadilan dan kesenangan terletak dalam menolak permohonan untuk penangguhan. Tindakan AS adalah pada peringkat mula prosiding, dan tidak terdapat apa-apa untuk menghalang plaintif-plaintif daripada tidak meneruskan dengan tindakan Malaysia terhadap defendan pertama hingga ketiga atas keputusan baik yang diperolehi oleh plaintif-plaintif pada persoalan bidang kuasa di hadapan mahkamah AS (lihat perenggan 9 & 14).]

Notes

For a case on special circumstances, see 2(5) *Mallal's Digest* (5th Ed, 2015) para 8673.

Cases referred to

A-G v Arthur Andersen & Co (United Kingdom) [1989] ECC 224, CA (refd)
Abidin Daver, The [1984] AC 398, HL (refd)
Excalibur Ventures LLC v Texas Keystone Inc [2011] EWHC 1624 (Comm) (dstd)

- A *HSBC Bank (M) Bhd v Jejaka Maju Resources Sdn Bhd & Ors* [2015] 10 MLJ 645; [2015] 2 AMR 428; [2015] 4 CLJ 81; [2014] MLRHU 591, HC (refd)
- B *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 5 AMR 758; [2003] 4 CLJ 1; [2003] 1 MLRA 536, FC (refd)
- Ledra Fisheries Ltd & others v Turner & others* [2003] EWHC 1049 (Ch), Ch D (refd)
- Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461; [2013] 1 AMR 1; [2012] 9 CLJ 557; [2013] 1 MLRA 181, FC (refd)

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Legislation referred to

Carriage by Air Act 1974

Rules of Court 2012

- D Rules of the High Court 1980

- Balan Nair Thamodaran (Malini Subramaniam with him) (Thomas Philip) for the plaintiff.*
- Saranjit Singh (Hoe Mei Lei and Dhiya Damia with him) (Saranjit Singh) for the first defendant.*
- E *Sanjeev Kumar (Sanjeev Kumar) for the second defendant.*
- Alice Yoke (Senior Federal Counsel, Attorney General's Chambers) for the fourth to seventh defendants.*

- F
- Azizul Azmi Adnan JC:**

[1] The present case is one of many that has been commenced by the next-of-kin of the passengers on the ill-fated flight MH370.

- G [2] The plaintiffs applied to stay proceedings pending a determination by a United States court on whether it has jurisdiction to hear cases commenced in the United States by the plaintiffs. The first to third defendants here are also defendants in the US action. The fourth to seventh defendants are not.

- H [3] Learned counsel for the plaintiffs contended that the Malaysian action has been filed as a protective writ in order that the action does not become barred by limitation. Under the Montreal Convention and the Carriage by Air Act 1974, limitation would have set in after a period of two years from the date of the putative arrival of the flight. This suit was filed a few days before the action would have expired.
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[4] Counsel for the plaintiffs explained in the course of submissions that, should the question of jurisdiction be decided in its favour in the US action, the plaintiffs would discontinue proceedings against the first to third defendants in

Malaysia, leaving them to continue to pursue this case against the fourth to seventh defendants in Malaysia.

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[5] The plaintiffs further contended that the facts of the present case amounted to special circumstances as would justify the grant of a stay of the Malaysians proceedings, based on the principles laid out in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 5 AMR 758; [2003] 4 CLJ 1; [2003] 1 MLRA 536.

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PROTECTIVE WRIT

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[6] Although there was no specific averment contained in the affidavit deposed in support of the plaintiff's application, I am satisfied that, in the circumstances of this case, this Malaysian action has been filed at least partly as a protective writ. That this is so can be seen from the fact that the first of the three US actions had been commenced one month prior to the Malaysian writ, and that the Malaysian action had been filed just four days prior to the onset of limitation.

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[7] That the form of the statement of claim sets out in detail the nature of the plaintiff's claim does not, in my judgment, make it any less a protective writ. In this regard I do not share the views of learned counsel for the first defendant, Mr Saranjit. The wide-ranging nature of the plaintiff's claim in and of itself does not militate against a finding that the suit was intended to preserve the plaintiff's rights from being barred by limitation.

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SPECIAL CIRCUMSTANCES

[8] As mentioned earlier, a stay of proceedings may only be granted if the applicant is able to show that special circumstances exist to justify the grant of a stay. This principle applies equally where a plaintiff, who has commenced claims against the same set of defendants based on the same facts in two or more jurisdictions, then seeks to stay one of those proceedings: see *Ledra Fisheries Ltd & others v Turner & others* [2003] EWHC 1049 (Ch).

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[9] In the present instance, I am satisfied that the writ in Malaysia was filed as a protective action in order to preserve the plaintiff's cause of action in Malaysia in the light of the foreshortened period of limitation applicable under the Montreal Convention. Does the fact that the action is a protective writ give rise to special circumstances within the meaning of *Kosma Palm*? In my judgment, the protective nature of the writ does not of itself give rise to special circumstances, although it does provide a valid answer to the contention that the Malaysian action amounted to an abuse of the court process.

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- A [10] On the other hand, the prevention of a multiplicity of actions is a valid policy consideration to be taken into account by the court when exercising its discretion whether or not to grant a stay of proceedings. See, for example: *HSBC Bank (M) Bhd v Jejak Maju Resources Sdn Bhd & Ors* [2015] 10 MLJ 645; [2015] 2 AMR 428; [2015] 4 CLJ 81; [2014] MLRHU 591. In
- B addition, there is the potential for there to be costs savings in the event that one action is stayed, as the two proceedings will not have to proceed concurrently.
- C [11] These are, however, not the only considerations. Against them must be weighed the need for cases to be disposed of in an expeditious and economical manner as well as the potential prejudice that may be occasioned to the fourth to seventh defendants in having the Malaysian action hanging over them for an uncertain duration, pending disposal of the jurisdictional hearing in the USA to which, it must be remembered, they are not even parties.
- D [12] The plaintiffs in the present instance are well entitled to have commenced this action as a protective writ. Though it may be said that the Malaysian action is a contingency to be pursued against the first to third defendants only if the US court declines jurisdiction, the principles
- E international comity, in my view, dictate that the Malaysian courts recognise the plaintiff's choice as a valid and legitimate course of action.
- F [13] Now, having instituted the action in Malaysia, the plaintiff will necessarily have accepted that the progress of this case is now placed in the hands of the court, in consonance with modern approach of active judicial management of cases. See for example the decision of the Federal Court in *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461; [2013] 1 AMR 1; [2012] 9 CLJ 557; [2013] 1 MLRA 181, a case decided
- G under the Rules of the High Court 1980. It would appear that this would be more so under the Rules of Court 2012.
- H [14] Having regard to the facts of this particular case, I am of the view that the balance of justice and convenience lies in refusing the application for stay. I am cognisant of the cautionary advice given by the House of Lords in *The Abidin Daver* [1984] AC 398 against the dangers of permitting a multiplicity of suits to exist (*ibid* at p 412B (per Lord Diplock) and p 423H (per Lord Brandon). Briefly stated, they are the risk that there will exist two conflicting judgments and a rush towards disposal of the case). Nonetheless, the exercise of
- I the judicial discretion on whether or not to grant a stay is dependent on the factual circumstances of each case. In addition to the factors considered in the preceding paragraphs, I also note that the US action is at a very nascent stage of proceedings, and that there is nothing to prevent the plaintiffs from discontinuing the Malaysian action against the first to third defendants upon

the plaintiffs obtaining a favourable outcome on the jurisdictional question before the US court.

[15] In the course of arguments, counsel referred the court to the English Court of Appeal case of *A-G v Arthur Andersen & Co (United Kingdom)* [1989] ECC 224, the facts of which are similar those of the present case. The plaintiff in that case sued both in England and New York, and sought to stay its English proceedings in order to continue its New York action. Both the High Court and the Court of Appeal accepted that the English action had been commenced as a contingency to save the action from being barred by limitation, in the event that the jurisdiction of the New York court was successfully challenged. The Court of Appeal affirmed the decision of the trial judge to grant a stay of the action in England:

Naturally, if a plaintiff has thought fit to commence an action, with all the hardship to the defendant which this involves in terms of expense, worry and disruption, he should in general be made to face up to the situation which he has chosen to create, and should not be permitted to conduct the action to a timetable which corresponds only to his own whimsy. Having put his hand to the plough he should continue to the end of the furrow. This is only fairness and common sense. But the same considerations must demand that in some instances the approach should be different. The question for the learned judge, and for us also when reviewing his decision, is to my mind no more than this, whether the good management of the concurrent sets of proceedings clearly requires the English court, in charge of one set of those proceedings, to decree that a temporary halt should be called — temporary, because we must wait to discover what the American court is going to do. All agree that, if the American action ultimately fails for want of jurisdiction, the English action will resume where it has left off, and that, if the American action proceeds, it is in practice inevitable that the English action will either be left to wither informally, or will formally be made subject to an indefinite stay. To my mind this is precisely the spirit in which the learned judge, rightly, in my opinion, set himself to approach the problems raised by this particular case.

If the learned judge has thus directed himself correctly, is there any basis on which his decision can properly be overturned? I confess that I would be slow indeed to interfere with the exercise of his discretion, in what is essentially a question of the commonsense management of a case in his own list. I can see nothing material to his decision that he has omitted. Mr. Waller has very properly brought home to us in his forceful argument that a plaintiff who has chosen to subject a defendant to the hardship of an action cannot fairly be allowed to please himself how fast he proceeds; and that a plaintiff who has chosen to sue in two jurisdictions cannot be allowed freely to pursue one action or another to suit his own convenience. Again, we were reminded that this is an old claim, which involves serious imputations on the professional competence of the defendant firm, who are liable to suffer increasing hardship the longer they have to wait before they can bring forward the defence which they vigorously assert. They say that it is high time for these disputes to be resolved, and few would disagree. I am very conscious of these arguments. So also was the learned judge, for he said so. Given that he had them in mind, and yet decided that the commonsense of the matter demanded that further steps in the

A English action should await the resolution of the question of jurisdiction in New York, I would think it unacceptable for an appellate court to intervene (per Mustill LJ).

B [16] The passages above are instructive because they confirm that, firstly, in coming to a decision whether or not to exercise its discretion to grant a stay, a court must balance different and often competing policy considerations. Second and importantly, it also confirms that this decision is to be driven by a proper consideration of the particular circumstances of each case. Thus, even though a stay was granted in *A-G v Arthur Andersen & Co (United Kingdom)*, this does not mean that this court is bound to grant a stay in the present instance.

D [17] Reference was also made in the submissions of counsel to the more recent case of *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm). This case, however, can be distinguished on the basis that the court there rejected the contention that the English proceedings had been commenced purely as a protective action.

E [18] For the reasons I have explained, the plaintiff's application for stay is dismissed with costs of RM3,000 to the first defendant, RM3,000 to the second defendant and RM3,000 to the fourth to the seventh defendants collectively.

F *Plaintiffs' application dismissed with costs of RM3,000 each to first defendant and second defendant; and RM3,000 to fourth to seventh defendants collectively.*

Reported by Dzulqarnain Ab Fatar

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